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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 4

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION *

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STATEMENT

Oral argument in these cases was concluded on March 1, 1949. On June 13, 1949, an order was entered whereby they were restored to the docket for reargument. In this brief, the Government will supplement its discussion of certain questions in view of the arguments advanced in the brief of respondents (hereinafter referred to as "Resp.

*Together with No. 5, *United States of America, Petitioner* v. *J. Sheldon Potter;* No. 6, *United States of America, Petitioner* v. *Martin Erreca;* No. 7, *United States of America, Petitioner* v. *James J. Stevinson, a corporation;* No. 8, *United States of America, Petitioner* v. *Archibald J. Stevinson;* No. 9, *United States of America, Petitioner* v. *3–H Securities Company.*

Br."), the brief of a number of western states (hereinafter referred to as "States' Br.") and the brief of Gill, et al., the plaintiffs in actions in the Court of Claims which are said to be similar to the cases before this Court (hereinafter referred to as "Claimants' Br.").

SUMMARY OF ARGUMENT

I

A. Under its authority to provide for the general welfare and to pay debts of the United States, Congress has, of course, power to recognize claims of a "moral or merely honorary nature." But legal defenses are waived or liability is assumed for moral claims only when Congress expressly so provides. If liability were to be inferred from language not explicitly addressed by Congress to the problem, its unlimited discretion in such matters would be invaded. For, in such a case, Congress would have been deprived of the opportunity to decide such matters as the extent of the liability to be assumed, the manner and means of its imposition, and the conditions upon recovery.

B. In this setting, it is clear that Congress has not assumed liability to respondents in legislation relating to the Central Valley project. The statutes relating thereto do not contain any language even remotely resembling a direction to pay respondents or others, or a waiver of a Governmental defense. On the contrary, the project

authorization in the 1937 Act was explicitly stated by Congress to be an exercise of its powers over navigable streams. An Act so grounded can hardly be read as a waiver of a right that is the Government's by virtue of those powers. This is certainly true when an assumption of liability is sought to be inferred from language merely appropriating funds for the purchase, *inter alia*, of "water rights." The language of appropriation is not a direction to pay. Even if it were to be so read, its obvious application would be to rights in non-navigable waters which were, in fact, affected by the project.

C. The contention that Congress has assumed an obligation to respondents in the legislation relating to the Central Valley Project assumes that respondents and others similarly situated unquestionably should be compensated. But there are opposing considerations which might well lead Congress to a contrary conclusion. Since respondents' lands were overflowed only during flood periods, their claim is for loss of a benefit which could be enjoyed only by inflicting flood losses upon other persons. There would seem to be little equity in such a claim.

Claims of rights to divert water from the river have even less stature. Those diversions, which substantially reduced the navigability of the river, were illegal and had the effect of depriving other persons of the benefits they might have enjoyed from navigation upon the river. If

appropriate action had been taken to obtain Congressional permission for such diversions, it is probable that authorization would have been granted only upon limitations and conditions. Recognition of a claim thus based upon failure or refusal to obtain the required authorization is not lightly to be imputed to Congress.

The plain fact is that the various factors bearing upon whether the liability here asserted should be assumed have never been presented to, or considered by, Congress. It is purely speculative what the Congressional conclusion would have been had the question been considered by it. And speculation will not serve as a substitute for the express language of assumption consistently required.

D. Congress has not granted or recognized private rights in navigable streams of the west. We have pointed out in the briefs previously filed that neither the decisions of this Court nor the language or purpose of the Act of July 26, 1866, the Desert Land Act, or the Reclamation Act, support such a contention. We show here that the actions taken by Congress and the administrative materials all confirm the contrary conclusion, and that the materials cited by claimants do not support their contentions.

The Act of March 3, 1891, as the Attorney General concluded shortly after its passage, did not affect the control over navigable streams which was vested in the Secretary of War. Similarly, a

construction of the Reclamation Act as constituting a grant of rights in navigable streams is refuted by the legislative and administrative actions with regard to legislation passed in 1905 and 1906. These demonstrate that, because of the River and Harbor Act, authority of Congress was necessary for the diversion of water from navigable rivers either by private interests or by the reclamation service. And even if the Act were to be construed as a grant of a right to use waters of navigable streams, it does not aid the respondents. For, under the Act, the "basis", "measure" and "limit of the right" must be "beneficial use" and the basis of respondent's asserted rights is not beneficial use but riparian location. Specifically, as to the San Joaquin River, a report of the Army Engineers made in 1917 pointed out that, because of the River and Harbor Act of 1899, the diversion of water therefrom was illegal in the absence of specific authorization.

There is nothing in the Federal Water Power Act and other statutes cited by the claimants which could constitute a grant to persons in respondents' position of rights to use the waters of navigable streams for irrigation, nor is their contention supported by the administrative decisions cited by the claimants. In contrast to these materials, it is the customary practice of Congress, when the federal control over navigable streams is waived, to act with reference to a particular body of water by declaring that it is not a navi-

gable water of the United States within the meaning of statutes relating to control of navigable waters.

E. The administrative action in purchasing water rights from Miller & Lux and others cannot be construed as an administrative construction that federal statutes impose a legal obligation to make such payments. The inconclusive nature of the administrative action is evidenced by the fact that the respondents in the present cases and the claimants in other cases who have filed a brief *amici curiae* themselves disagree as to what the administrative understanding was. Even if Congress had directed payment to Miller & Lux it would not follow that the respondents were entitled to collect. *United States* v. *McDougall's Adm'r*, 121 U. S. 89, 98.

II

A. The facts and authorities which demonstrate that Friant Dam was erected in exercise of the authority of the United States over navigable streams have already been fully set out in the briefs previously filed. The argument that there is a distinction in this regard between questions of constitutional authority to erect a dam under the commerce power and questions of compensability for the alleged taking of rights in navigable streams resulting from the erection of such a structure is fallacious. It represents, in fact, simply a repetition of the contention already re-

jected by this Court in holding that the authority over navigable streams may be exercised in aid of commerce and not merely for purposes of navigation.

B. Our general contention that there is no private property right in the flow of navigable streams as against the United States is not challenged but, rather, the argument is that the rule is different in the western states from that prevailing in the east. No such difference exists and the answer to the question as put by the States' brief—whether the rule of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, applies to navigable streams in the west—is clearly affirmative and, in fact, that rule has been so applied in at least two instances. *Continental Land Co.* v. *United States*, 80 F. 2d 104 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747.

ARGUMENT

I

THERE HAS BEEN NO STATUTORY ASSUMPTION OF LIABILITY TO RESPONDENTS

The brief for the claimants contends at length that it is unnecessary in these cases to determine any constitutional issue because there has been an assumption by Congress of an obligation to respondents (Points I–II; pp. 14–35). Respondents likewise urge a Congressional assumption of

liability (Br. 25–28). We shall, in this brief, outline those controlling principles and their application here as serve to demonstrate, in our view, that there has been no assumption of liability. As will more fully appear from the discussion herein, the same principles apply to the somewhat different but related contention advanced in the brief for the States.

A. *A claim against the United States, not otherwise grounded in law, can rest only on statutory language explicitly assuming liability.*— It is settled that Congress, under its authority to pay debts of the United States, may properly recognize claims "of a moral or merely honorary nature". *United States* v. *Realty Co.*, 163 U. S. 427, 440. And, in conjunction with its moral obligation to provide for the general welfare of the people (*Cincinnati Soap Co.* v. *United States*, 301 U. S. 308), Congress has undoubted power to appropriate funds for various purposes where there is no legal obligation to make payment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 586–587; *Helvering* v. *Davis*, 301 U. S. 619, 640; see *United States* v. *Butler*, 297 U. S. 1, 65–66. As stated in the *Realty Co.* case (p. 441): "Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of a moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its

foundation". See also *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 314.

But when Congress creates a claim against the United States not otherwise grounded in law, it does so expressly in language which is free from all doubt. See e. g., *Pope* v. *United States,* 323 U. S. 1; *United States* v. *Goltra,* 312 U. S. 203; *United States* v. *Klamath Indians,* 304 U. S. 119. This appears from the congressional practice and from judicial decisions with respect to acts of Congress said to constitute assumptions of liability. It is not to be assumed merely from passage of an appropriation act that Congress has created a legal claim which did not exist before. In all of the cases cited in the brief for the claimants (pp. 34–35), the direction to pay was explicit. Thus, in *United States* v. *Realty Co.,* 163 U. S. 427, the Act provided that bounties on sugar production "shall be paid by the Secretary of the Treasury," and similar mandatory language was used in *Medbury* v. *United States,* 173 U. S. 492 (excess amounts paid upon certain homestead entries "shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns"); *McLean* v. *United States,* 226 U. S. 374 (the proper accounting officers were "directed" to adjust the claim for back pay and emoluments); *United States* v. *Hvoslef,* 237 U. S. 1 ("the Secretary of the Treasury is hereby authorized and directed" to pay claimants for taxes illegally assessed and collected); and *United*

States v. *Laughlin*, 249 U. S. 440 (excess payments under public land laws "shall be repaid.").[1] In each instance, it was perfectly clear that Congress knew that, in enacting the statute, it was assuming a liability which either did not exist or could not be enforced. In *United States* v. *Hvoslef*, 237 U. S. 1, 10, this Court pointed out that the statute there involved "was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, * * *." Similarly, in *Dismuke* v. *United States*, 297 U. S. 167, 169, speaking of the provision of the Civil Service Retirement Act which declares that the employee "shall be entitled to an annuity" it was said, "The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay' ".

The reasons for requiring an explicit statutory assumption of liability are apparent. The recog-

[1] Most of these instances represent, in fact, simply a waiver of the sovereign immunity from suit rather than the creation of a legal obligation.

nition of moral claims "depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body." *United States* v. *Realty Co.*, 163 U. S. 427, 441. That discretion is not customarily exercised simply by a determination that a particular claim or type of claim deserves recognition. Instead Congress usually legislates with reference to related and collateral problems, depending upon the nature of the claim. Thus, Congress must decide whether it should provide "a forum for the adjudication of the claim according to applicable legal principles" (*United States* v. *Cumming*, 130 U. S. 452; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500), or whether the statute should simply direct an executive or administrative officer to pay a particular claim or class of claims. *Medbury* v. *United States*, 173 U. S. 492. Moreover, when the assumption of liability takes the form of a direction to an administrative officer, his determinations are sometimes made reviewable only for mistake of law or perhaps arbitrary or capricious action. *United States* v. *Laughlin*, 249 U. S. 440, 443; *Medbury* v. *United States*, 173 U. S. 492, 497. In other instances, however, the determination of the administrative officer is made conclusive. *United States* v. *Babcock*, 250 U. S. 328; *Work* v. *Rives*, 267 U. S. 175, 181–182; Pub. Law No. 896, 80th Cong., 2d sess., approved July 3, 1948, establishing the War Claims Commission; Pub.

Law No. 17, 81st Cong., 1st sess., approved March 15, 1949. In other instances, Congress specifically states the scope of judicial review. See Act of August 7, 1946, 60 Stat. 902.

Another regard in which Congress usually exercises its discretion is the question of a time limit for the filing of claims. Under the Tucker Act of March 3, 1887, 24 Stat. 505, now 28 U. S. C. 2501, the jurisdiction of the Court of Claims is limited to suits filed within six years from the time liability accrues. Cf. *District of Columbia* v. *Johnson,* 165 U. S. 330; *Tserionu, et al.* v. *United States,* 94 C. Cls. 142. It has been the frequent practice of Congress, especially in recent years, in statutes where liability is assumed for moral or honorary considerations, to impose much shorter time limits upon the presentation of claims. See Act of August 7, 1946, 60 Stat. 902, requiring the filing of claims with the interested department or agency within six months after passage of the Act and the filing of suit within six months after administrative action; Pub. Law No. 730, 80th Cong., 2d sess., requiring filing of suit in one year; Pub. Law No. 886, 80th Cong., 2d sess., requiring filing of claims within 18 months of passage of the Act. In the statute involved in *United States* v. *Hvoslef,* 237 U. S. 1, a period of less than two years for filing claims was allowed.

If something less than plain language were permitted to serve as an assumption of liability, matters of this sort, sometimes procedural, sometimes

substantive, and often important, would be left at large. It is in recognition of this wide discretion of Congress to determine the extent to which, if at all, liability should be assumed, that the courts have always insisted that an intention to assume liability must be explicitly stated in the statute. In every case, if the intention existed "it would have been easy to have said so in express terms", *United States* v. *Hotel Co.*, 329 U. S. 585, 590.

The importance, in a Congressional assumption of liability, that provision be made as to the extent of that liability and the means of its enforcement, has led to the conclusion that the absence of express language cannot be supplied by inferring from debates, committee reports and similar materials that an intention existed to assume liability. As this Court said in *United States* v. *N. Y. Rayon Co.*, 329 U. S. 654, 659, "Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms". Similarly in *Pine Hill Coal Co.* v. *United States*, 259 U. S. 191, a contention based upon the legislative history of the Lever Act was rejected by Mr. Justice Holmes, stating (p. 196):

> It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage. Here we have as against the

> arguments of the claimant the fundamental and necessarily governing consideration that rightly prevailed below. A liability in any case is not to be imposed upon a government without clear words.

See also *United States* v. *Zazove,* 334 U. S. 602, 617; *Maryland Casualty Co.* v. *United States,* 155 F. 2d 823, 826 (C. A. 4).

Thus, as held in *Mitchell* v. *United States,* 267 U. S. 341, a statutory assumption of liability may not be rested upon the fact that funds have been appropriated to pay losses resulting from the procurement of land for which the United States would not be chargeable under the Fifth Amendment. The Congressional action taken where such liability is held to be assumed is vividly illustrated by *United States* v. *Alexander,* 148 U. S. 186, cited in the *Mitchell* case, where the statute provided that "any person * * * who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may * * *" recover in the Court of Claims. Statutes by which, it is contended, a liability not otherwise existing is assumed, are subject to strict construction in determining whether there has, in fact, been an assumption of liability. Also, when it is clear that some obligation has been assumed, the same rule applies in determining who are the beneficiaries, the time for making claims and similar

details. "Viewed in the light of a gratuity, a gift, wholly without consideration, the statute itself must receive a strict construction; not such a construction as will prevent the fair meaning thereof from taking effect, but such as shall not be enlarged by inferences or implications not plainly to be drawn from the language of the act." *District of Columbia* v. *Johnson*, 165 U. S. 330, 338; *United States* v. *Goltra*, 312 U. S. 203, 210. Another application of this same principle appears in the rule that grants of public property are strictly construed and "nothing passes but what is conveyed in clear and explicit language." *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 272; see also *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257; *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546; cf. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86; *Ute Indians* v. *United States*, 330 U. S. 169, 179. In *Leavenworth etc. RR. Co.* v. *United States*, 92 U. S. 733, 740, this Court stated that "if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them."

B. *Congress has not assumed liability to respondents in legislation relating to the Central Valley Project.*—In view of the legal principles and legislative practice we have discussed, it is perfectly clear that the various enactments re-

lating to the Central Valley Project cannot be given the effect of a statutory assumption of liability. None of the statutes contain any words even remotely resembling a direction to pay, and none can be read, in the light of the strict rules of construction already referred to, as waiving rights of the United States. Much is made of the references to "water rights" in the administrative authorization of the plans for the project in 1935 (Respondents' Br. pp. 4–5, 9–10, 17, Appendix i–x; Claimants' Br. 4–5, 28). But, obviously, this administrative approval could not under any view constitute a Congressional assumption of liability. Certainly, the reference to the plan set forth in House Rivers and Harbors Committee Document Numbered 35, Seventy-Third Congress, as approved by the Act of August 30, 1935, 49 Stat. 1028, 1038, cannot be so construed.[2] The plan referred to was that adopted by the State of California and with respect to

[2] It should be noted that this reference is not to the plan approved by the Secretary of the Interior, so heavily emphasized by respondents and the claimants, but to the description of the project proposed by the State of California made in the report to Congress by the Chief of Engineers. The Central Valley Project involved navigable streams and it is clear that the approval of the plan under the Reclamation Act for construction out of funds allocated under the Emergency Relief Appropriation Act of 1935 could not constitute sufficient authorization for the project, Congressional action being required either by appropriating funds for the project or otherwise. Cf. *United States* v. *Arizona*, 295 U. S. 174.

which the Chief of Engineers, in document 35, recommended that the United States contribute $12,000,000 toward the state project. Obviously, the authority for such a contribution could not possibly constitute an assumption of liability by the Federal Government in any particular.

Reference is made (Claimants' Br. 28) to Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850 (Gov't's Main Br. pp. 4–6), which reauthorized the Central Valley Project and empowered the Secretary of the Interior to acquire "by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes". This authorization cannot be tortured into an assumption of a liability which would not otherwise exist under the Fifth Amendment. Indeed, the reference to "proceedings in eminent domain" negatives such an idea since there is no suggestion that in such proceedings a rule of liability different from, and greater than, that ordinarily prevailing is to be followed. If condemnatio proceedings had been instituted under that statutory provision, their initiation would not have constituted an admission of liability. Instead, such proceedings would have merely furnished a forum where all issues of legal liability could have been determined. Cf. *United States* v. *San Geronimo Development Company*, 154 F. 2d 78 (C. A. 1), certiorari denied, 329 U. S. 718; *United States* v. *Chun Chin*, 150 F. 2d 1016 (C. A. 9); *Wittmayer* v.

United States, 118 F. 2d 808 (C. A. 9).[3] In those circumstances, the situation would have been analagous to that created by a special jurisdictional act which simply provides a forum for adjudication of claims and creates no legal liability. *United States* v. *Cumming*, 130 U. S. 452; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500.

An admission of liability to pay for the alleged rights to the waters of navigable streams is further contradicted by the fact that, in authorizing the project in the 1937 Act, Congress expressly stated that it was exercising its powers over navigable streams and directed that the structures should be operated, first, for the purposes of navigation and commerce. That legislative declaration precludes a reading of the Act as a direction to pay for damages for which the United States would otherwise not be liable because of its control over navigable streams. Moreover, the assertion (Claimants' Br. p. 28, fn. 25) that the phrase "water rights" necessarily referred to rights in navigable streams because the project involves the taking of water rights only from the

[3] See also *Albrecht* v. *United States*, 329 U. S. 599, holding that the fact that a contract is enforced in condemnation proceedings does not enlarge the Government's liability for interest. For other instances illustrating the general principle that claims are not waived by institution of condemnation proceedings, see *United States* v. *Turner*, 175 F. 2d 644 (C. A. 5), pending on petition for a writ of certiorari, No. 268, this Term; *United States* v. *Runner*, 174 F. 2d 651 (C. A. 10); *United States* v. *State of Oklahoma*, 168 F. 2d 858 (C. A. 10).

San Joaquin is not in accord with the facts. On the contrary, there are water rights in many non-navigable streams such as the Pitt River and the Fresno Slough of the Kings River in the Central Valley which will be directly affected by the Central Valley Project. See *Pitt River Power Company* v. *United States,* 98 C. Cls. 253, certiorari denied, 319 U. S. 747. Thus, for example, the Miller & Lux contract transferred to the United States rights in the waters of Fresno Slough, among others. The fact is that the claims that have been thus far asserted are not limited to the San Joaquin. Many claims for compensation have been made to the administrative authority with reference to the Sacramento River. For example, the City of Redding has asserted a right to recover damages because of the alleged violation of its right under California law to receive water of the same quality as it had before the construction of Shasta Dam because Shasta Reservoir reduces the amount of exposure of water of the river to the warming rays of the sun and thus makes it too cold for use in the City's swimming pool.

The fallacy of the argument based upon the use of the phrase "water rights" in the authorization of condemnation proceedings is demonstrable in another way. That authorization likewise refers to "rights-of-way" and, of course, there are many miles of rights of way which are

required for the various canals which are part of the Central Valley Project. A very substantial portion of those rights of way are located upon lands which were formerly part of the public domain and in which a right of way for irrigation ditches was reserved under the Act of August 30, 1890, 26 Stat. 391, see *Ide* v. *United States,* 263 U. S. 497. It is absurd to suppose that by authorizing condemnation of rights of way, Congress intended to assume liability for all such rights which had been reserved under the 1890 Act; nevertheless, that would be the result if the claimants' construction of this portion of the 1937 Act were accepted.

It is thus clear that there is nothing in the 1937 Act indicating a Congressional assumption of an obligation not otherwise existing to pay for alleged rights in navigable streams. The amendment made by the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200 (Govt.'s Main Br., pp. 6–7) likewise contains no such language.

The only other statutory language in all of the legislation referred to (Claimants' Br. 29–32) is the appropriation in the Act of July 12, 1943, 57 Stat. 451, 476, for "examinations, surveys and water rights". See statutes quoted at pages 81–96 of Government's Main Brief. This falls far short of the "clear words" assuming liability which must appear (see *supra,* pp. 13–14). In fact, the above-quoted phrase is even further removed

from an assumption of liability than the language employed in the appropriation act in the *Mitchell* case (*supra*, p. 14). There it was at least clear that the losses referred to would not have ordinarily been payable under the Fifth Amendment, while here it is not even clear that the phrase "water rights" was expanding liability since non-navigable streams are also involved (*supra*, pp. 18–19).

The attempted distinction of the *Mitchell* case on the ground that there a sufficient intention to widen accepted limits for recovery did not appear (Claimants' Br. 35) demonstrates that the argument here urged constitutes simply an attempt to use other materials from which a "statutory policy" is implied (Claimants' Br. 35) as a substitute for express language of Congress. This may not be done, see *supra*, pp. 13–14. See also *United States* v. *McDougall's Adm'r*, 121 U. S. 89, discussed *infra*, pp. 45–46 which is conclusive against the claim based on statutory policy.

Even if it could be assumed that the appropriation acts cited could constitute an assumption of liability, a further implication that a liability in excess of the amount appropriated had been assumed, would not be permissible. Cf. *Sutton* v. *United States*, 256 U. S. 575; *Hooe* v. *United States*, 218 U. S. 322, 332–333; 27 Comp. Dec. 662. Hence, respondents, the claimants who have filed a brief *amici curiae*, and the other parties who have filed suits could recover only by showing

that their claims do not exceed the appropriations. But, as stated in our petition for certiorari (p. 25), suits seeking to recover more than $2,000,000 have already been filed and a number of claims have been submitted for administrative disposition. Since many of these claims are for unliquidated amounts, it is impossible to tell whether available appropriations are sufficient to satisfy them. But it is unreasonable to conclude that Congress intended that those whose claims first matured in judgments should have the prior right. Here again the contrast with the procedure followed by Congress where it intends to assume a liability not otherwise existing vividly emphasizes the lack of merit in the present claim. When Congress is so minded, it either provides by a special jurisdictional act for a judgment by the Court of Claims to be paid in the usual manner or it expressly provides that the payment shall be made "out of any moneys of the United States not otherwise appropriated" *United States* v. *Hoslef*, 237 U. S. 1; see also *United States* v. *Realty Co.*, 163 U. S. 427; *Medbury* v. *United States*, 173 U. S. 492; *Bang* v. *United States*, 31 F. Supp. 535 (D. Minn.), affirmed, 117 F. 2d 515 (C. A. 8).

Neither the respondents nor the claimants have been able to fix on any particular act of Congress on which to rest their respective contentions that the liability here sought to be imposed on the United States has been assumed. The various

acts of Congress relied upon extend over a span of some fourteen years.[4] That being so, we are left entirely at large as to the date on which a limitation period, typically short in gratuitous legislation (see *supra*, p. 12), is to begin to run. Apparently the argument is that Congress intended that the time for filing suit should run from the date the claimant was damaged. But here again it is entirely speculative whether Congress would have so decided or would instead have selected some definite date. Moreover, as the court below has found, the respondents were at the time of trial getting all the water they ever got, and hence had not yet sustained damage. See Gov't's Main Br. pp. 74–75. The argument does not, therefore, support the judgments entered by the court below.

C. *The existence of a moral or honorary obligation to respondents is, at best, doubtful.*—Up to this point in our argument, we have assumed the existence of some obligation to the respondents and have pointed out that, even on that assumption, there is no basis for the contention that

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[4] Rule 11 of the Court of Claims requires that "If the claim is founded upon an act of Congress * * * the act and the section thereof on which plaintiff relies shall be specified." The petitions in four of these cases referred to 14 acts of Congress (R. 8–9, 24–25, 50–52, 152–154), while two of them contain no such references (R. 154–157, 157–160). It is, at best, doubtful whether these petitions complied with the rule. See *McMahon* v. *United States*, 104 C. Cls. 366.

Congress has chosen to honor such obligation. We shall now retrace our steps, in a sense, in order to question respondents' basic premise that they have claims which, if not legally justifiable, are morally so.

Respondents have the heavy burden of convincing the Court that the Congress has assumed a legal obligation to compensate them for losses which they had not suffered at the time most of the legislation relied upon was enacted or even at the time of trial in the court below. See Gov't's Main Br., pp. 74–75. The judgments there entered awarded amounts for the future loss of benefits respondents enjoyed from the uncontrolled floods of the San Joaquin River. Even though, for legal purposes, the California courts include these annually recurring floods as part of the normal flow of the river, the fact remains that these floods cause loss of life and serious damage to homes, industries, transportation facilities and crops. The result is that heavy expenditures are required both by local interests and by the Government to minimize the effects of these floods. There would seem to be little equity in the claim of a right to pasture cattle which can only be enjoyed by inflicting losses of this sort upon others, especially when (a) for such purpose only a small amount of the water is actually absorbed while the larger part flows on to do its damage and then to waste into the sea (R. 103), and (b) with minor exceptions, no works have been

built nor investments made in order to take advantage of such flow. In this connection, it should be emphasized that, while respondents' argument is pitched on the assertion that the purpose of Friant Dam was irrigation of other lands, it is the flood control feature which causes their damage. As we have previously pointed out (Gov't's Main Br. 57–58), the damage would be the same whether the flood waters were diverted or simply stored and released later. The injury to respondents would have been exactly the same if the floods had been controlled by a system of levees holding the river within its channel during flood periods resulting in discharge of those waters into the sea. Respondents could not complain if such a procedure had been followed. As to the flood waters, the only difference between such a method of control and the method adopted is the fact that Friant Dam provides a means of accomplishing the same result and, at the same time, so far as possible, puts the flood waters to beneficial use rather than having them waste into the sea. Certainly, the fact that the flood waters might thus be used for irrigation does not improve respondents' position.

The respondents' arguments would, of course, impose a legal obligation on the United States running not only to them but to others whose claims are of different types. Illustrative is the claim of the East Side Canal Company, which was consolidated with the present cases for trial but

was remanded to the commissioner for further findings. R. 74; see *East Side Canal Company* v. *United States,* 76 F. Supp. 836. The claimants and the states argue that the problem is the same whether riparian or appropriative rights are concerned (Claimants' Br. 15; States' Br. 8). And, as respondents recognize (Br. 27–28), these various alleged rights encompass practically the entire flow of the river. But the diversions made by the East Side Canal Company and others in a similar position could only be legal if a permit therefor had been obtained from the Secretary of War and the illegality of such diversions without permits has been noted. H. Doc. No. 332, 65th Cong., 1st Sess., p. 56. See *infra,* pp. 38–40. It is clear that had application for permits been made, the Secretary would have been obliged to reject them since the diversions would destroy the navigability of the river (see H. Doc. No. 395, 73rd Cong., 2d Sess.) and if the matter had been presented to Congress, it is probable that the diversions would have been authorized, if at all, only with limitations and restrictions. Compare the action taken by Congress with reference to the Sacramento River in the Act of May 9, 1906, 34 Stat. 185 (see also H. Rept. No. 3216, 59th Cong., 1st Sess., relating thereto, *infra,* pp. 33–34) and the bill suggested in 1917, relating to the San Joaquin River diversion, which provided that the United States would not object to certain diversions prior

to July 1, 1945 (H. Doc. No. 332, p. 70).[5] Thus, the claims based upon unlawful diversions are probably much more extensive than the value of diversion rights which would have been given had application for authorization been made. There would seem to be little equity in a claim thus founded upon failure or refusal to obtain the required permission. Certainly, having enjoyed this illegal benefit for many years, the diverters would not seem to be in a position to demand compensation when that advantage is lost. And further militating against these claims is the fact that the diversions destroying navigation were at the expense of other persons who might have enjoyed the benefit of navigating upon the river. No means of reading into the statutes an obligation running to riparian owners but not to appropriators is suggested. The fact that respondents' arguments would lead to the imposition of liability as to both is striking evidence of the wisdom in the rule that liability is to be deemed assumed only when Congress has explicitly assumed it.

Moreover, even when the project is physically completed, respondents and other persons who have been receiving water from the San Joaquin

[5] Similarly under the California Debris Commission Act of March 1, 1893, 27 Stat. 507, 33 U. S. C. secs. 661–687, hydraulic mining is prohibited in the territory drained by the Sacramento and San Joaquin Rivers except by permission of the commission. *United States* v. *North Bloomfield Gravel Min. Co.*, 81 Fed. 243 (C. C. N. D. Cal.).

River will not be automatically deprived of all benefits. While the findings of the Court of Claims indicate that the reduction in natural flooding of respondents' lands was the controlling factor considered in determining the amounts awarded (Fdgs. 56, 62, 87, R. 110, 113, 128; St. Fdgs. 42, 46, 49, R. 188, 190, 190-191), the rights claimed by them were not so limited but included other uses of the flow of the river, such as use for domestic purposes, for the purpose of watering livestock (Fdg. 28, R. 87–88), and in the case of Martin Erreca, No. 6, for the purpose of subirrigation by seepage and for irrigation by pumping water from the river (Fdg. 62, R. 113). Such benefits will be lost only to the extent that water is diverted from the river. And water will be diverted through the Friant-Kern and Madera Canals only to the extent that sales thereof are made to persons within the area served by the canals. Such sales are limited by the provision of Section 5 of the Reclamation Act of 1902, 43 U. S. C. 431, that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner. See Montgomery and Clawson, *History of Legislation and Policy Formation of the Central Valley Project* (U. S. Dept. of Agr., Bu. of Agric. Econ., Berkeley, Calif., 1946), pp. 131-176. Thus, the amount of water to be used does not depend simply on the will of the government officers but, rather, it is contingent upon the willingness of

qualified potential users to make contracts to purchase it. Since, even in respondents' view of the case, their rights are subordinate to the rights acquired by the United States from Miller and Lux, diversion of water by the Government will not impair the rights claimed by respondents until the sales of water exceed the Miller & Lux rights (see R. 81-83). Certainly, there is no basis for a conclusion that in the legislation relating to this project, Congress assumed an obligation to pay for water which may never be needed. Yet that would be the result of acceptance of the contention here urged.

None of the materials cited by the respondents or claimants indicate that any of these factors relating to the question whether respondents have a moral claim were ever considered by Congress. It is completely speculative as to what the conclusion of Congress would have been in this particular. This disposes not only of the argument based on the language of the statutes but also of the suggestion that there has been an administrative determination of a moral obligation which has been ratified by Congress (Claimants' Br. pp. 33–34; see also Gov't's Reply Br. pp. 9–11).

To summarize: There are three possible interpretations of the legislation upon which the respondents rely. First, that Congress intended that only valid existing rights should be paid for,

but this view would not aid respondents. Second, that Congress intended to authorize the purchase of claimed rights, whether they were legally enforceable or not, when it was desirable to do so in order to permit the project to proceed without the delays incident to litigation of such questions if injunction proceedings should be instituted or otherwise to advance the interests of the government. This construction likewise does not support claimants' contention. Their argument necessarily is, therefore, that the legislation means that Congress not merely authorized but *directed* that payment be made for all water rights claimed even though such alleged rights were not valid as against the United States, and even though such alleged rights might never be needed for execution of the governmental purpose. Plainly the statutes cited cannot be construed as constituting such a gift.

D. *Congress has not granted rights in the waters of the San Joaquin River to respondents.*—It is contended that Congress has treated the west differently from the east, that it has either granted or recognized western water rights, or that Congress has "subordinated" its control over navigable streams in the west to local water right law (States' Br. 15, 17; see, also, Claimants' Br. 18–27). The same principles concerning the construction of statutes in which Con-

gress is alleged to have assumed a liability not otherwise existing or have granted public property to individuals (*supra*, pp. 8–15) are applicable to these contentions.*

We have previously pointed out that neither the language nor the purpose of either Section 9 of the Act of July 26, 1866 (Reply Br. 3–4), the Desert Land Act (Gov't's Main Br. 47, 68), or Section 8 of the Reclamation Act of 1902 (Gov't's Main Br. 66–71, Reply Br. 4–6) lends support to a contention that thereby Congress has assumed liability to respondents or relinquished its rights in navigable streams. Moreover, as we have already pointed out (Gov't's Main Br. 68–71, Reply Br. 7–9), the decisions of this Court, the actions taken by Congress, and the administrative material, all confirm the conclusion that the statutes cited do not constitute grants of private rights to the waters of navigable rivers, nor do they in any way subordinate federal rights to local law. Neither the statutes nor the administrative materials cited by the claimants indicate otherwise. We shall, in this

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* Compare the statement in *Slidell* v. *Grandjean*, 111 U. S. 412, 437, quoted in *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257, that when there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest" the doubt is resolved in favor of the government.

section of the brief, attempt to make a further showing of the accuracy of this statement.

1. *The Act of March 3, 1891, 26 Stat. 1095.*— Attention is called (Claimants' Br. 39) to certain language in the Act of March 3, 1891, 26 Stat. 1095. Section 18 of that Act provides for the grant of a right of way over public lands to canal or ditch companies for irrigation purposes and concludes with the language cited by the claimants, that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Only a few years after passage of this act, the Secretary of War requested an opinion of the Attorney General whether the Secretary of the Interior had authority to authorize construction of a dam across the Rio Grande under Sections 18 to 21 of the 1891 Act, no approval thereof having been given by the Secretary of War. Attorney General McKenna concluded that no such authority was granted by the 1891 Act, stating, "There is nothing in the act or its purposes which was intended to affect the control or supervision of the navigable rivers of the country. That, by other and indeed later legislation, is put in the Secretary of War." 21 Op. A. G. 518, 520. The opinion then quotes Section 10 of the River and Harbor Act of September 19, 1890, 26 Stat. 454, and Section 7 of the Act of July 13, 1892, and concludes, "These provisions are very definite, and

the answer to your inquiry is obvious if the stream be a navigable one. This you assert, and I assume it." See also *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 705–707.

2. *The Reclamation Act of 1902.*—The construction sought to be given the Reclamation Act of 1902 by respondents and claimants is refuted by legislative interpretations of that Act.[1] Thus, despite its passage, Congress twice, within four years, found it necessary to enact legislation in order to permit diversions of water of navigable rivers for irrigation purposes by private interests in the one case and the reclamation service in the other. By the Act of May 9, 1906, 34 Stat. 185, the Central Canal and Irrigation Company was granted a right to divert specified amounts of water from the Sacramento River, one of the rivers in the Central Valley Project, for purposes of irrigation, subject to various restrictions. The reports of the committees of the House and Senate describe the situation in detail and state *inter alia* (H. Rept. No. 3216, 59th Cong., 1st Sess., pp. 2, 5–6; S. Rept. No. 2900, 59th Cong., 1st Sess., pp. 3, 6–7):

> The legislation seems to be necessary in order that suitable works and structures may be erected on a navigable stream and

[1] Legislative construction is, of course, entitled to great weight (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309), especially when it is practically contemporaneous. Cf. *United States* v. *Mine Workers*, 330 U. S. 258, 281–282.

permit the diversion and the use for irrigation of such water of the stream as is not absolutely necessary for navigation purposes, which otherwise would be illegal under existing law. The bill permits this to be done under restrictions and safeguards which protect navigation, so far as possible under the circumstances, and prevent serious injury to the navigable stream.

* * * * * *

At the time of organization of central irrigation district the State of California had full and absolute control of the waters of the Sacramento River and all navigable streams wholly within its borders. It was not until September 1890, that the Federal Government assumed control for the purposes of navigation of the navigable waters of California.

Both administrative and legislative recognition of the fact that the Secretary of the Interior was likewise limited by the Rivers and Harbors Act in the construction of projects under the Reclamation Act appears from the history of the Act of March 3, 1905, 33 Stat. 1045, authorizing the Secretary to construct dams for such purposes in the Yellowstone River in Montana. In recommending passage of this bill and a companion bill, the Director of the Geological Survey, with the concurrence of the Secretary of the Interior, stated:

This legislation is intended to overcome the technical objection to such works due to

> the fact that the said rivers are technically navigable and as such are embraced within the provisions of the River and Harbor Act of March 8, 1891 [sic] (30 Stat. 1121) [which prohibits the placing of obstructions in navigable streams except by special authority of Congress]. While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.*

The report of the House Committee on Irrigation of Arid Lands relating thereto states (H. Rept. No. 4834, 58th Cong., 3d Sess.):

> The reclamation service of the Geological Survey, having charge of the construction of irrigation works under the national reclamation act, has in contemplation the construction of irrigation works in Montana, using the waters of the Yellowstone River for the irrigation of arid lands. The Yellowstone River in its lower reaches, where it is proposed to construct these works, was at one time used in a very limited way for the purposes of navigation, though it has not been so used in a commercial sense for many years; and in order that there may be no question as to the authority of the Secretary of the Interior to construct dams across the river, to be used in the diversion of waters for irrigation, the building of which dams

*The complete text of these unpublished letters is set out in the Appendix, *infra*, pp. 56–62.

> would impede navigation if the same existed, it has been deemed wise to pass the bill herein proposed.

This report has special significance since it was submitted by Mr. Mondell of Wyoming who had been in charge in the House of the bill which became the Reclamation Act of 1902 (see Claimants' Br. 20) and since the conclusion of the committee would seem to be confirmed by this Court's decision in *United States* v. *Arizona*, 295 U. S. 174, holding that the Secretary of the Interior could not construct Parker Dam without the consent of Congress.

Moreover, the construction of the Reclamation Act urged by the respondents and claimants does not aid the respondents. Section 8 of that Act contains the proviso "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and *beneficial use shall be the basis, the measure, and the limit of the right*" 32 Stat. 388, 390; 43 U. S. C. sec. 372. [Italics supplied]. We believe that, correctly construed, the section does not grant any rights and that the proviso simply establishes the rule controlling use of the water distributed by the government project. See Gov't's Main Br. pp. 67–68. But even if Section 8 were construed as an authorization for the acquisition of some kind of rights under state law, the proviso, which applies to the right to use of the water "under the provisions of this Act," would exclude the

rights here claimed by respondents. The only rights claimed by respondents are riparian, the existence of which is based solely upon the geographical relationship between their lands and the river. Resp. Br. 4, 40–41, 44–45.* They have no foundation in beneficial use. Thus in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, the court, in describing the nature of riparian rights pointed out at p. 95: "The right to the flow of water *is inseparably annexed to the soil,* and passes with it, not as an easement or appurtenant, *but as a parcel.* Use does not create, and disuse cannot destroy or suspend it." (Italics by the court). And at pages 96–97 it quoted from an earlier California case that "The plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands * * *." The right arising under the appropriation doctrine is of an entirely different nature. As this Court stated in *Ickes* v. *Fox,* 300 U. S. 82, 94, after referring to the proviso of Section 8, "Under the Reclamation Act, *supra,* as well as under the law of Washington, 'beneficial use' was 'the basis, the measure and the limit of the right.'" The appropriative right is created by beneficial use. "The first ap-

* In response to our contention that the Court of Claims failed to make a finding describing the property interest taken (Gov't's Main Br., point V, pp. 72–73) respondents rely (Br. 32) upon the allegations of their petition that as owners of the land they were "entitled to all rights of riparian owners with respect" to the river (R. 2, 19, 46, 150, 155, 158).

propriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 154; see also *Atchison* v. *Peterson*, 20 Wall. 507, 510–511. The right is thus measured by reference to such use and does not extend to all the water in the stream. And, unlike the riparian right, disuse destroys it. As the court below held in the companion case of *East Side Canal Co.* v. *United States*, 76 F. Supp. 836, 839, appropriative rights are lost by the failure to apply water to a beneficial use. To support its holding, it cited *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450; *Smith* v. *Hawkins*, 110 Cal. 122. It is thus clear that the rights claimed by the respondents are unaffected by the Reclamation Act.

3. *Specific proposals for the San Joaquin River.*—As to the San Joaquin River, a report of the district engineer, made in 1917 and concurred in by the division engineer, pointed out (H. Doc. No. 332, 65th Cong., 1st sess., p. 56):

> So far as can be ascertained here all diversion of water from the San Joaquin and its tributaries above Stockton are in violation of the river and harbor act of 1899, no congressional acts or department permits having authorized them. It is believed that the time has come when this matter should no longer be allowed to remain simply in a state of indifferent tolerance. The situation here is, in general

principles, very similar to that considered for the upper Sacramento River, as covered in the latter portion of a report on the preliminary examination of that river, submitted by the Sacramento Feather River Board under date May 17, 1916. (H. Doc. 1893, 64th Cong., 2d sess.)

There is, therefore, recommended the enactment of general legislation to the effect that the United States will not interfere under its paramount navigation protection rights with the diversion of water for irrigation purposes from any part of the San Joaquin River watershed draining past the mouth of Merced River until July 1, 1945, and that during the session of Congress beginning in the December of 1944 the California Debris Commission shall report, through the Chief of Engineers and Secretary of War, to Congress, with recommendations, and reasons therefor, on the subject as to whether this period should then be extended or whether those interests diverting water from the stream should be required to compensate therefor during certain low-water periods to permit navigation.

There was attached (pp. 70–71) a proposed form of bill which provided that the United States would not interfere with or object to the diversion of water for irrigation purposes in a specified area before July 1, 1945, "*Provided*, That, except as to the diversion of water for irrigation purposes, the existing laws for the pro-

tection and preservation of the navigable waters of the United States shall remain in full force and effect." The division engineer concurred in the recommendations of the district engineer (p. 57). The report of the Board of Engineers stated (p. 5) that it "does not consider the special legislation proposed by the district officer to be essential. It recommends, however, that no objection be made by the department to the diversion of water from the San Joaquin River and tributaries for irrigation purposes." The Chief of Engineers concurred generally in the views of the district engineer, the division engineer and the board. Thus, the appropriate administrative authorities have recognized that the federal control over the San Joaquin River has not been subordinated to local law as to use of water for irrigation.

4. *The Federal Water Power Act and other statutes cited by the claimants.*—The federal control over navigable streams was again exercised in the Federal Water Power Act of June 10, 1920, 41 Stat. 1063. Here again no distinction was made between eastern and western streams and, in recognition of the applicability of the act to the San Joaquin, power companies have secured permits as required thereby (R. 34). Reliance is placed (Claimants' Br. 40–41) on Section 27 of the Act, 16 U. S. C. 821. But like the similar language of Section 8 of the Reclamation Act, this is not a grant of rights or a waiver of immunity. (See Gov't's Main Br. 67–68).

Rather, as this Court stated in *First Iowa Coop.* v. *Power Comm'n,* 328 U. S. 152, 175, it is a "saving" clause,[10] and neither grants nor creates new rights superior to the Federal Government's right to control navigable waters. The clause represents simply a refusal to confer upon licensees all federal authority as to navigable streams. *Great Northern Ry. Co.* v. *Washington Electric Co.,* 197 Wash. 627; cf. *United States* v. *Central Stockholders' Corporation,* 52 F. 2d 322, 330 (C. A. 9). The reference to similar provisions in other acts (Claimants' Br. 39) likewise adds nothing to the argument since, as stated in *City and County of San Francisco* v. *Yosemite Power Company,* 46 L. D. 89, 96, with reference to Section 11 of the Raker Act of December 19, 1913, 38 Stat. 242, 250: "The language of section 11 is similar to that contained in section 8 of the Reclamation act of June 17, 1902 (32 Stat., 388), and there is nothing in the language of either section to indicate that the intent of Congress was to go further" in the other acts than it did in the Federal Power Act.

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[10] In the debates in Congress cited in the *First Iowa* case (328 U. S. at p. 177) Mr. Mondell, who had been in charge of the bill which became the Reclamation Act (*supra*, p. 36), pointed out the similarity of the Water Power Act provision to Section 8 of the Reclamation Act, which, he stated, "is simply a recital of what is the law and recognizes the conditions under which the Secretary of the Interior is to proceed to the development of his enterprises", 51 Cong. Rec. 13631.

5. *Customary method of surrender of federal control.*—When particular instances make it desirable to waive the federal control, it is done by a declaration that the particular body of water is not a navigable water of the United States within the meaning of the laws enacted by the Congress for the preservation and protection of such waters. See the various acts codified in 33 U. S. C. secs. 21–55. In this regard, no distinction is made between eastern and western states, but, rather, express provision is made for particular streams in the arid land states. See Act of October 23, 1913, 38 Stat. 233 (Oregon); Act of February 26, 1917, 39 Stat. 937 (Oregon); Act of March 10, 1937, 50 Stat. 28 (Texas); 33 U. S. C. secs. 34, 39, 50. These are merely additional examples of the general principle that governmental rights are waived or liability assumed only by specific legislation relating to a particular situation.

6. *Administrative decisions.*—There is nothing in the administrative decisions cited by the claimants to support their contentions (Br. 26). While they assert that in *Theodore A. Iasigi,* 39 L. D. 285, the Department of the Interior "recognized for a desert land entry the validity of water rights * * *" to the use of water from the Colorado River, such is not the case. Nowhere in that opinion is the validity of the claimed right even considered. Instead, the entryman's application for a patent was rejected because the

water available to him could not be used on the land he sought even if the right were all he claimed it to be. *Underground Water Claims, Utah*, 55 I. D. 378, again recognizes that the Desert Land Act of 1877 is limited to nonnavigable waters. After quoting from *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, it was stated (p. 379): "Having thus surrendered its primary rights to nonnavigable waters on the public domain * * *." Like the underground water involved in the *Utah* decision, the subject matter of the other three decisions cited (Claimants' Br. 26, fn. 21) plainly had nothing to do with navigable wafers of the United States. And there was no occasion to discuss any question relating to such waters.[11]

This history demonstrates that, contrary to the arguments advanced by the claimants, the uniform understanding of this Court, as well as of both Congress and the administrative authorities, has been that all navigable streams, eastern and western, are subject to the same control which has been exercised by the California Debris Commission Act, the Rivers and Harbors

[11] The decisions in *Jackson Hole Irrigation Co.*, 48 L. D. 278, and *Myers and Myers*, 49 L. D. 106, cited by claimants in footnote 21 (Br. 26), related to intrastate lakes which, even if they are assumed to be navigable, would not be navigable waters of the United States. *The Montello*, 11 Wall. 411, 415. It does not appear that any navigable waters were involved in the third decision, *Authority to Cause Diversion of Waters*, 57 I. D. 400.

Acts of 1890 and 1899, and the Federal Power Act, and that the various acts cited by the respondents, the claimants and the States, have in no way limited this control nor subordinated it to local law as to use of water for irrigation or any other purpose.

E. *The payments made to Miller & Lux and others do not constitute an administrative construction supporting the contentions of respondents and the other claimants.*—In support of both the arguments that an obligation has been assumed in legislation relating to the Central Valley Project and that the various other statutes constitute a relinquishment or subordination to local law of the federal authority over navigable streams in the west, much reliance is placed upon the fact that payments were made to Miller & Lux and others as constituting an administrative construction supporting their argument. The argument, however, ignores the distinction between an authorization to spend money for a particular purpose and the existence of a legal right of the beneficiary thereof to compel such payment. We have previously pointed out (Reply Br., p. 10) that the making of payments is entirely consistent with the view that no legal obligation to do so exists.

The mere fact that payments were made does not aid respondents or the claimants since even if Congress itself had directed such payments, recovery would not be justified. In *United States*

v. *McDougall's Adm'r*, 121 U. S. 89, special acts had been passed authorizing recovery by certain claimants for certain cattle furnished to Indians in California, and the Court of Claims had entered judgments, which were not appealed, granting recovery to other persons in the same class on the ground that there had been legislative recognition of the obligation of the United States to pay such claims. This Court, however, reversed the holding granting a similar award to McDougall's administrator, saying (p. 98):

> That Congress, by special acts, made provision for the payment of particular claims of the same class furnished no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. Such legislation may well furnish the basis for an appeal to the legislative department of the government to place all claimants, of the same class, upon an equality. But we are aware of no principle of law that would justify a court in treating the allowance by Congress of particular claims as a recognition by the government of its liability upon every demand of like character in the hands of claimants. We may properly take judicial notice of the fact that many claims against the United States cannot be enforced by suit, but provision for which may, and upon grounds of equity and justice ought

to be, made by special legislation. But the discretion which Congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it cannot appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class.

The same considerations apply to the suggestion that the liability of the United States to McDougall's administrator, as upon contract, may arise from the failure or refusal of their law officers to prosecute appeals from judgments against the government in suits brought by other parties, holding similar claims. The question to be determined is, not whether the representatives of the government have heretofore been guilty of neglect in not prosecuting such appeals, but whether, in the case in hand, the plaintiff has a valid claim in law against the United States.

It is equally difficult to see how the fact that payments were made could constitute an administrative construction that a legal obligation exists to make such payment when there is nothing to show that consideration was given either to the many authorities or to the various factual matters which are relevant to such a conclusion. In this connection, it should be noted that respondents and the claimants take divergent views as to what the administrative position was. Claimants

suggest (Br. 28) that "It has never occurred to anyone, until this litigation, that the rights to this water might be seized for the purpose of resale, without compensation." On the other hand, respondents state (Br. 28): "The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation." Thus, although they reach the same ultimate result, respondents and the claimants are in disagreement as to what the administrative understanding was. In such circumstances, it cannot be said that there has been an administrative construction of an ambiguous statute or statutes which aids the interpretation thereof.

There is another particular in which the distinction between a legal obligation to take action and the desirability of doing so is ignored. Emphasis is placed upon the amount expended in transferring water from the Sacramento River to the San Joaquin Valley and it is said that this heavy expenditure "is wholly unnecessary if the Solicitor General's argument be sound" (Claimants' Br. p. 29). But it is perfectly clear from the history of the Central Valley Project that the transfer of water was not authorized because of a belief that a legal obligation existed to supply water to persons in the San Joaquin Valley. On the con-

trary, it was done for the purpose of putting all the waters of the Central Valley to best use to serve all interests and was not based upon legal obligations that might exist as to any of those interests. See Govt.'s Main Br. 30–32. The fact that a particular action is taken obviously does not imply that there is a legal obligation to take it.

II

THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS, AND RESPONDENTS HAVE NO PROPERTY RIGHTS AGAINST THE UNITED STATES IN THE FLOW OF SUCH STREAMS

A. *The Friant Dam was erected in exercise of the authority of the United States over navigable streams.*—We have shown in our main brief (pp. 24–39) and our reply brief (pp. 11–14) that Friant Dam was erected in exercise of the constitutional authority of Congress over navigable streams and that the assertion (Claimants' Br. 46) that Congress understood that Friant Dam "was intended to produce only irrigation benefits" is contrary to the express declarations and directions of Congress. However, a distinction is sought to be made between questions of compensability and of authority, the contention being that while the project was authorized under the commerce power, the issue is different when the question is one of compensability for the taking of navigable waters (see Claimants' Br. 44, 47). It has never been suggested by this Court

that while a project relating to a navigable river was constitutionally authorized under the commerce power, nevertheless, the governmental immunity from liability in such cases is inapplicable. The argument constitutes simply another phrasing of the attempt to limit the power over navigable streams to control for navigation, which as this Court has pointed out, is not so limited but instead is as broad as the commerce power. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508; *United States* v. *Commodore Park*, 324 U. S. 386. Indeed, substantially the same argument in somewhat different form was rejected by this Court in the *Appalachian Power* case. It was there argued that even though the stream was navigable, certain provisions of the license, required by the Federal Power Act, were beyond the power of Congress to impose because they would constitute a taking of property without payment of just compensation. This contention was rejected, the Court stating, *inter alia* (311 U. S. at p. 427): "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power."[12] Thus the au-

[12] It should be noted that this Court at 311 U. S., pages 424–426, explained the meaning of the language in *United States* v. *River Rouge Company*, 269 U. S. 411, 419, *Kansas* v. *Colorado*, 206 U. S. 46, 85–86, and *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63, which is nevertheless relied upon by the claimants (Br. 48–49).

thority of Congress to undertake activities upon navigable streams without liability for loss of benefits enjoyed in the flowing waters is coextensive with its authority to regulate such activities by others. This is implicit in decisions such as *United States* v. *Commodore Park*, 324 U. S. 386, and *United States* v. *Willow River Co.*, 324 U. S. 499, rejecting claims for compensation. The power transmission line example given by claimants (Br. 44) further demonstrates the fallacy of their argument because, of course, lands may not be taken without payment of compensation for a navigation improvement or any other purpose, but no right to compensation arises from use of navigable waters for commerce clause purposes.[13]

The decision in *International Paper Co.* v. *United States*, 282 U. S. 399 (Claimants' Br. p. 48), is irrelevant since there the authority over navigable streams was not sought to be exercised, while, here, Congress has expressly declared that the project is for the purpose of "improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods * * *" etc. The reliance placed

[13] The understanding that constitutionality of the project and compensability present the same issue is also illustrated by the fact that there are now pending in the United States District Courts for the District of Columbia and for the Southern District of California cases which seek to enjoin, for lack of constitutional authority, the taking of alleged water rights in the San Joaquin River by erection of Friant Dam.

upon this decision is, we submit, further demonstration that the claimants are seeking simply to ignore the congressional declaration.

B. *Owners of land riparian to a navigable river do not own the flowing waters as against the United States.*—Respondents apparently do not controvert our general contention (Main Br. 39–48) that there is no private property in the flow of navigable streams as against the United States. And *amici curiae* seem to concede the general rule. Thus, the brief of the States founds its argument completely on the alleged difference between eastern and western states and the claimants similarly argue for a different result in the western states from that prevailing in the east. In fact, these arguments represent simply a reiteration of the contention that there has been an assumption of liability or a waiver of the governmental authority over navigable streams. As the States' brief puts it (p. 15), "The main question now appears to boil down to this: Is the rule of the *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the correct rule to apply to consumptive water rights on navigable streams in the West?"

But no mention is made of the fact that the rule of the *Chandler-Dunbar* case has been applied in the western states. *Continental Land Co.* v. *United States*, 88 F. 2d 104, 109 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747. Since no at-

tempt is made to distinguish these cases, the position apparently taken is that they should be overruled. A distinction cannot be made between use of water for purposes of irrigation and use for power purposes. Neither riparian nor appropriative water rights are limited to use of water for irrigation but they include use for mining, municipal, industrial, power and other beneficial purposes. Indeed, as the historical summary of the States' brief emphasizes (pp. 5–6), the new system originated from the need of water in placer mining, was referred to as the custom of miners, and the 1866 Act referred to use of water "for mining, agricultural, manufacturing, or other purposes". The fact is that the use of water for power might well create less interference with navigable streams than use for irrigation. Although power use sometimes consumes the water, this is obviously less frequent than the diversion of whole streams from their beds for irrigation (States' Br. p. 7). Thus, if a distinction were to be made on the basis of use it would more logically favor power uses over the much more destructive irrigation uses. The fact is that no distinction has ever been made. The States' argument is thus contrary to precedent and is an attempt to create rights where none have existed heretofore.

It is said that water users in the west "have believed themselves shielded by the Acts of Congress" (States' Br. p. 16). Whether they have is, of course, a matter of conjecture but, even if they have, it is of no moment. The argument is similar to the

claim of estoppel against the Government which was rejected by this Court in *Sanitary District* v. *United States*, 266 U. S. 405. That was a suit by the United States to enjoin the diversion of water from Lake Michigan through a canal into the Illinois River in amounts in excess of those authorized by the Secretary of War. Many years earlier, Congress had granted land to Illinois in aid of the construction of the canal. It was contended that the United States had invited and acquiesced in the construction of the canal to divert the water and was, therefore, estopped to deny the right to divert. 266 U. S. at 410. This Court rejected the contention, saying (p. 428):

> * * * if it [the land grant] has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan.

This Court went on to hold that the Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403, forbade any diversion not thereafter authorized by the Secretary of War.

Surely, the State of Illinois had a better right to rely upon its specific authorization to build the canal as a grant of a right to use the waters which the canal would carry than western water users have to rely upon general legislation which, in the case of the Act of 1866, applied to all areas where public lands were situated extending as far east as Ohio and, in the case of the Desert Land Act, was in terms limited to nonnavigable waters.

It is thus clear that the federal authority over navigable streams is no less in the western states than it is in the east. If anything, it is greater in the west since the United States there possesses not only the authority over navigable streams but also the powers attendant upon the fact that the lands were public domain of the United States and rights exist therein only to the extent they are granted by the Federal Government. The admission of the western states on an "equal footing" with the eastern states cannot, of course, mean that the navigation control is less in the west than it is in the east.

It is also asserted (Claimants' Br. 23) that the Government's argument would produce chaos in the western states because it denies the validity even among private citizens of water rights to navigable rivers. No such argument is advanced. In the west, as in the east, there are many benefits in the rivers which may be enjoyed, such as use thereof for the movement of boats, for taking fish, for building wharves, docks, etc., which do

not interfere with navigation. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69–70. Nor do we controvert the authority of the state to establish the rights of individuals to use the waters as against other private persons. We do contend that, as against the United States, such rights must give way to the superior governmental right or rather "that as against the Government such private interest is not a right at all." *United States* v. *Willow River Co.*, 324 U. S. 499, 510. Similarly, for many years, rights as between private persons to use the public domain and national forests for grazing purposes were recognized and local statutes relating thereto were given effect. *Buford* v. *Houtz*, 133 U. S. 320; *Omaechevarria* v. *Idaho*, 246 U. S. 343. But no vested rights as against the United States were created thereby. See *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523. And, in the Taylor Grazing Act, explicit provision was made as to the limitations under which the public domain could be used for such purposes. See *Brooks* v. *Dewar*, 313 U. S. 354. In *Osborne* v. *United States*, 145 F. 2d 892 (C. A. 9), many other examples were given of situations where a federal permit is valuable and the rights thereunder are protected between private parties but no vested right is acquired against the United States. Cf. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86.

CONCLUSION

In this supplemental brief we have pointed out that there has been no assumption of liability to respondents and that there has been no compensable taking within the meaning of the Fifth Amendment. The other issues in these cases have already been fully discussed in our main brief and our reply brief. We submit, therefore, that the judgments of the court below should be reversed with directions to dismiss the petitions.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

MARCH 1, 1905.

The CHAIRMAN OF THE COMMITTEE ON
IRRIGATION OF ARID LANDS,
House of Representatives.

SIR: I am in receipt of your letter of the 18th ultimo, enclosing a copy of H. R. 17942, entitled "A Bill To authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming."

In response to your request that I inform your Committee as to the necessity and advisability, in my opinion, of passing the proposed legislation, I transmit herewith a copy of a letter of the 25th ultimo from the Director of the Geological Survey, in which, for reasons stated, he recommends that a favorable report be made on the bill.

Concurring in the Director's recommendation, I have the honor to recommend that the bill be enacted into law.

Very respectfully,

_____,
Secretary.

* * * * *

Irrigation in Montana and Wyoming.
(Report on H. R. 17942).

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, D. C., February 25, 1905.

The Honorable, the SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by Departmental reference, of a letter dated February 18 from Hon. F. W. Mondell, Chairman of the House Committee on Irrigation of Arid Lands, inclosing a copy and requesting a report upon H. R. 17942, "A Bill to authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming."

The bill is designed to authorize the Secretary of the Interior to construct a dam or other works in or along the Yellowstone and Missouri Rivers or their tributaries in Montana and Wyoming whenever it shall be necessary for the diversion of any part or all of the waters thereof for the purposes contemplated in the Reclamation Act.

This legislation is intended to overcome the technical objection to such works due to the fact that the said rivers are technically navigable and as such are embraced within the provisions of the River and Harbor Act of March 3, 1891 (30 Stat. 1121), which prohibits the placing of obstruction in navigable streams except by special authority of Congress. While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.

The waters of the streams in question are very valuable for irrigation works and numerous projects have already been surveyed and found feasible for the use of such water in irrigation. Used in this way they will render fertile hundreds of thousands of acres of land and add many millions of dollars to the resources of the country, while for navigation purposes the rivers are practically valueless.

It is informally understood that this is essentially the view taken by the engineers of the War Department who have not recently recommended any expenditure of money for improving or maintaining the navigation of these streams.

In view of these facts I have the honor to recommend that a favorable report upon the bill in question be made to the Committee on Irrigation of Arid Lands.

Very respectfully,

[S] ——— ———,

Director.

* * * * *

COMMITTEE ON IRRIGATION OF ARID LANDS,
HOUSE OF REPRESENTATIVES U. S.,
Washington, D. C., February 18, 1905.

The Honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith a copy of H. R. 17,942, "A Bill to authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming," with a request, on behalf of the Committee on Irrigation of Arid Lands, of the House of Representatives, that you inform the Committee, at your earliest convenience, as to the neces-

sity and advisability, in your opinion, of passing the proposed legislation.

Very truly yours,

[S] ——— ———,
Chairman.

* * * * *

MARCH 1, 1905.

The CHAIRMAN OF THE COMMITTEE
ON IRRIGATION OF ARID LANDS,
House of Representatives.

SIR: With a letter of the 18th ultimo, you transmitted a copy of H. R. 18905, entitled

> A Bill To authorize the construction of irrigation works on the Yellowstone and Missouri Rivers in Montana and North Dakota, and permit the use of the waters of said rivers,

and requested that I inform your Committee as to the advisability and necessity, in my opinion, of passing the proposed legislation.

In reply, I transmit herewith a copy of a report of the 25th ultimo from the Director of the Geological Survey relative to the bill in which, for reasons stated, he recommends that the Department submit a favorable report.

The Director calls attention to the fact that this bill embodies substantially the same provisions as H. R. 17942, on which he reported also under date of February 25, 1905.

The Director's report on H. R. 17942 was transmitted to you by letter of even date recommending favorable action on the bill. I have the honor

to recommend, therefore, that the bill under consideration, H. R. 18905, be enacted into law.

Very respectfully,

_____,

Secretary.

* * * * *

Irrigation in Montana and Wyoming.
(Report on HR 18905).

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, D. C., February 25, 1905.

The Honorable the
SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by Departmental reference, of a letter dated February 18 from Hon. F. W. Mondell, Chairman of the House Committee on Irrigation of Arid Lands, inclosing a copy and requesting a report upon H. R. 18905, "A Bill to authorize the construction of irrigation works on the Yellowstone and Missouri rivers in Montana and North Dakota, and permit the use of the waters of said rivers."

The bill is designed to authorize the Secretary of the Interior to construct a dam or other works in or along the Yellowstone and Missouri rivers or their tributaries in Montana and North Dakota whenever it shall be necessary for the diversion of any part or all of the waters thereof for the purposes contemplated in the Reclamation Act.

This legislation is intended to overcome the technical objection to such works due to the fact that the said rivers are technically navigable and

as such are embraced within the provisions of the River and Harbor Act, March 3, 1891 (30 Stat. 1121). While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.

The waters of the streams in question are very valuable for irrigation works and numerous projects have already been surveyed and found feasible for the use of such water in irrigation. Used in this way they will render fertile hundreds of thousands of acres of land and add many millions of dollars to the resources of the country, while for navigation purposes the rivers are practically valueless.

It is informally understood that this is essentially the view taken by the engineers of the War Department who have not recently recommended any expenditure of money for improving or maintaining the navigation of these streams.

The bill referred to embodies essentially the same provisions as H. R. 17942, a report upon which has been transmitted to the Department of even date herewith. It is believed that Bill H. R. 18905 is preferable to the other for the reason that it specifically mentions the State of North Dakota through which the Missouri River runs.

In view of these facts I have the honor to recommend that a favorable report upon the bill in question be made to the Committee on Irrigation of Arid Lands.

Very respectfully,

[S] ——— ———,

Director.

* * * * *

COMMITTEE ON IRRIGATION OF ARID LANDS,
HOUSE OF REPRESENTATIVES U. S.
Washington, D. C. February 18, 1905.

The Honorable the
SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith, on behalf of the Committee, a copy of H. R. 18905, "A Bill to authorize the construction of irrigation works on the Yellowstone and Missouri rivers in Montana and North Dakota, and permit the use of the waters of said rivers," with a request that, at your earliest convenience, you inform the Committee as to the advisability and necessity, in your opinion, of passing the proposed legislation.

Very respectfully,

[S] ——— ———,
Chairman.

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